

TAM:DBS:mel:2000V00753

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

M. ASH-SHARIEF AL'ASKARI,	:	
Plaintiff	:	Civil No. 1:CV-00-1449
	:	(Caldwell, J.)
v.	:	(Smyser, M.J.)
	:	
KATHLEEN HAWKES, et al., ,	:	Electronically Filed
Defendants	:	

BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION TO DEPOSE INCARCERATED PERSON

Case History

Al'Askari is a former inmate. While incarcerated at FCI Allenwood, however, he filed this Bivens action against four BOP employees alleging violations of his due process rights and a denial of access to the courts. A motion to dismiss and for summary judgment was granted by the Court on April 21, 2001, for failure to exhaust administrative remedies. An appeal to the Third Circuit Court of Appeals followed.

In an unreported opinion issued on January 13, 2003, the Third Circuit affirmed the District Court's Order to the extent it dismissed the complaint against three of the defendants. The District Court's Order was vacated to the extent it granted the defendants' motion and dismissed the complaint against defendant Goldring on the access to the courts claim.

On April 11, 2003, the case was remanded to the Magistrate Judge for further proceedings on the access to courts claim. A case management order was issued on April 29, 2003, setting forth the deadlines for discovery, discovery-related motions, dispositive motions, and consent.

On July 29, 2003, a notice of deposition was served upon Al'Askari noticing him that his deposition would be conducted on August 14, 2003, at 10:00 a.m. in the Harrisburg branch office of the United States Attorney's Office. In response, Al'Askari filed a motion for appointment of counsel. The motion has since been denied.

On August 13, 2003, counsel for defendant received a "Notice of Deposition" from Al'Askari indicating that he intended to take the depositions of Robin Greggs and Viola Hursh immediately following his scheduled deposition on August 14, 2003. See Exh. 1, Notice of Deposition. Al'Askari's signature block on the notice contained his mailing address, electronic mail address, telephone number, and facsimile number where he can be contacted. Id., p. 2.

In response to the notice of depositions, counsel for the Government sent a letter to Al'Askari indicating that neither Greggs nor Hursh would be appearing for depositions the following

day.¹ The letter explained first, that one-day notice was not "reasonable notice" to depose a witness under Federal Rule of Civil Procedure 30(b)(1). Second, since Greggs and Hursh are no longer parties to the action, Al'Askari was required to serve a deposition subpoena on them in accordance with Federal Rule of Civil Procedure 45. Third, Al'Askari was informed that, even though he is proceeding *in forma pauperis*, he is still required to pay his own discovery expenses, including witnesses' fees and mileage, and the costs of a court reporter. Finally, since discovery was scheduled to close on August 25, 2003, counsel agreed to accept service of the deposition subpoenas on behalf of Greggs and Hursh, if Al'Askari was willing to comply with the Federal Rules of Civil Procedure. Counsel also indicated his availability on August 19, 20, and 25. See Exh. 2, Letter dated August 13, 2003.

On August 14, 2003, Al'Askari's deposition was taken as scheduled.

On August 21, 2003, Al'Askari filed a motion for enlargement of time to complete discovery. In support of his motion, Al'Askari cited defendant's failure to produce Greggs and Hursh for depositions on August 14, 2003, and counsel's line of questioning during his deposition which he claimed to be

¹Several attempts to fax the letter to Al'Askari at the number provided in his Notice of Deposition were unsuccessful.

irrelevant to the "sole" issue of this case, which he believes to be limited to whether he exhausted his administrative remedies. See Doc. 70. Al'Askari did not seek the concurrence of undersigned counsel in the filing of his motion. Nonetheless, the motion was subsequently granted and the deadline for completion of discovery was extended to October 15, 2003.

On August 22, 2003, Al'Askari filed a request for the issuance of three witness subpoenas, pursuant to Fed. R. Civ. P. 45, in order that he can obtain the attendance of non-parties for depositions. See Doc. 72. Three subpoenas signed by the Clerk of Court were forwarded to plaintiff the same day. See Doc. 73.

On August 27, 2003, counsel received, via facsimile, a Notice of Deposition and subpoenas for Robin Greggs, Viola Hursh, and inmate Irving Alvin commanding each of them to appear for depositions on September 9, 2003, at 11:30 a.m. "at the office of Joseph McClusky, attorney, FCI Allenwood Complex, White Deer 17887." See Exhs. 3 and 4. The facsimile also included notes to Greggs and Hursh informing them of their right to waive witness fees. See Exh. 5.

On August 28, 2003, the Government received, via facsimile, a Notice of Deposition for defendant Goldring for "Tuesday, 9 September, at 11:30 at the office of Joseph McClusky, Esq., attorney advisor . . . at Allenwood Federal Complex, White Deer 17887." See Exh. 6.

On September 3, 2003, counsel for defendant sent a letter to Al'Askari via federal express and facsimile² informing him that the depositions of Greggs, Hursh, Goldring and inmate Irving could not take place on September 9, 2003, primarily because defendant Goldring, who no longer resides in the Commonwealth of Pennsylvania, was not available on that date. Al'Askari was also advised that Federal Rule of Civil Procedure 30(a)(2) required him to first seek leave of Court prior to deposing inmate Irving. The letter also suggested that the depositions take place at the United States Attorney's Office in Harrisburg because the Warden of FCI Allenwood would not agree to have the depositions conducted at the prison. Additionally, Al'Askari was told that he would be provided with a list of available dates in the near future. See Exh. 7.

In a similar letter dated September 5, 2003, Al'Askari was advised that Goldring, Hursh, and Greggs were all available to be deposed during the week of September 29, 2003. Al'Askari was also reminded of his responsibility, under Federal Rule of Civil Procedure 30(b), to make arrangements for a court stenographer. See Exh. 8.

²The United States Attorney's Office telephoned Al'Askari in order to verify his facsimile phone number.

Later that day, Al'Askari was contacted by telephone in an effort to reschedule the depositions.³ Although the week of September 29, 2003, was the only week in September available for the defendant, the staff witnesses, the undersigned, and agency counsel, Al'Askari indicated he was not available that week. Al'Askari instead indicated his desire to do the depositions on October 9th or 10th. Additionally, in response to the Warden's concern with having the depositions conducted at the prison, Al'Askari suggested the Williamsport United States Attorney's Office as an alternative site.

Unfortunately, when counsel for defendant later checked the availability of others for October 9 or 10, he was reminded that agency counsel is scheduled to be out-of-state on business that entire week. Additionally, the undersigned determined that the Williamsport Office was too small to accommodate the depositions.

On September 8, 2003, counsel again wrote to Al'Askari regarding the scheduling of depositions. Al'Askari was asked to again review his schedule and see if it was possible to depose the witnesses on any day during the week of September 29 through October 2. If not, Al'Askari was requested to provide a list of alternative dates in order to determine the witnesses'

³The United States Attorney's Office has telephoned Al'Askari twice: (1) once to request his facsimile number, which he refused to provide; and (2) to inform him that depositions could not take place at FCI Allenwood on September 9, 2003.

availability. Additionally, counsel explained the difficulty in conducting the depositions in the Williamsport branch office and again proposed that he reconsider scheduling them in Harrisburg. If Al'Askari agreed, he was told that Hursh and Greggs would waive the witness and mileage fees they would otherwise be entitled to under Rule 45. Thus, Hursh and Greggs would appear in Harrisburg at no cost to Al'Askari. Moreover, Al'Askari's own travel expenses from Philadelphia would be less due to the shorter distance to Harrisburg. Al'Askari was once again reminded of his responsibility for reserving a court reporter and was provided with a listing of agencies that offer stenographic services. See Exh. 9. To date, Al'Askari has not responded to the letter.

Argument

Presently before the Court is Al'Askari's request for leave to depose inmate Irving Alvin on October 9, 2003, "at the office of Joseph McClusky, FCI Allenwood, Advisor/Attorney to Brian Simpson, U.S. Attorney." Doc. 75, p. 2. As a procedural matter, defendant notes that Al'Askari has failed to file a brief in support of his motion. Therefore, it should be deemed withdrawn in accordance with M.D. Pa. Local Rule 7.5.

To the extent the motion is construed to include a supporting brief, defendant opposes the relief requested as

Al'Askari has failed to indicate the relevancy of the inmate's testimony to this action.

Under the general provisions of the federal rules governing discovery, "[p]arties may obtain discovery regarding any matter, not privileged, that is *relevant* to the claim or defense of any party," Fed. R. Civ. P. 26(b)(1). The purpose of the pre-trial-deposition-discovery procedure is for the discovery of facts *relevant* to the subject matter of the action, or to unearth leads as to where evidence may be located. Beirne v. Fitch Sanitarium, Inc., 20 F.R.D. 93, 94 (S.D.N.Y. 1957) (*citing* Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50 (S.D.N.Y. 1951)). Thus, unless Al'Askari can establish the relevance of this witness, his motion for leave to depose this incarcerated individual should be denied.

To the extent Al'Askari seeks the Court's intervention in the scheduling and location of the defendant's and the staff witnesses' depositions, the undersigned submits that his Office has been more than accommodating to Al'Askari's demands and is willing to continue in its efforts to do so. The Government remains willing to produce Goldring, Hursh and Greggs for depositions in Harrisburg, at no cost to the plaintiff, at a

mutually convenient date. To that end, defendant does not object to an extension of the discovery deadline for this purpose.

Conclusion

For the reasons stated above, Al'Askari's motion for leave to depose inmate Irving should be denied.

Respectfully submitted,

THOMAS A. MARINO
United States Attorney

s/ D. Brian Simpson
D. BRIAN SIMPSON
Assistant U.S. Attorney
Atty. I.D. No. OH 71431
316 Federal Building
240 West Third Street
Williamsport, PA 17703
Telephone: 717-221-4482
Facsimile: 717-221-2246

Dated: September 22, 2003

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

M. ASH-SHARIEF AL'ASKARI,	:	
Plaintiff	:	Civil No. 1:CV-00-1449
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v.	:	(Smyser, M.J.)
	:	
KATHLEEN HAWKES, et al., ,	:	Electronically Filed
Defendants	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That on September 22, 2003, she served a copy of the attached

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by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

Addressee:

M. Ash-Sharief Al'Askari
5737 N. 12th Street
Philadelphia, PA 19141

s/ Michele E. Lincalis
MICHELE E. LINCALIS
Paralegal Specialist